to reserved power in the people, since both branches of the government would have to be satisfied that a given act falls within the exception. Moreover, the judicial review should not prove unduly restrictive, since the legislative body must be deemed to have acted constitutionally in all doubtful cases.[8] It may be presumed that the courts will act wisely and liberally here as they have done in the somewhat similar case of legislation under the police power; and that the purpose of the emergency clause will not be endangered. Whether even such restriction on the legislature is advisable or not is another matter; if it is not, that is a reason for attacking the referendum amendment, but not for indirectly weakening it by giving it an interpretation it was not meant to bear.

It is not possible to distinguish or discuss all the cases which present similar difficulties. But an excellent contrast is presented by the authorization given by Congress to the President to call out the militia whenever there shall be "imminent danger of invasion," the exercise of which power has been held not subject to review by the courts.[9] There it may become a question of national life or death, and immediate unhampered action may be imperative. The whole purpose of the power, and the efficiency of the militia, would be lost if each militiaman could demand a judicial review of the President's orders. Further, it is a power which need rarely be exercised, and opinion as to the necessity for its exercise would seldom differ widely. Surely this is very different from the situation in the principal cases, where the frequent exercise of a broad power might well lead to its extended use as a device for avoiding a referendum.

ENFORCEMENT BY INJUNCTION OF A STATUTORY RIGHT OF PERSONALITY. — A recent case in New York, which has attracted some popular interest, raises issues of much importance in the common-law system of legal and equitable rights and remedies. *Woollcott* v. *Shubert*, 154 N. Y. Supp. 643. A statute provides that discrimination between persons on the part of theater managers shall be a misdemeanor, and further provides for a penalty recoverable in a private action by the person so injured. Plaintiff, a dramatic critic who had been excluded on the ground that his reviews were unfair, sought relief by injunction. Relief was refused on the ground that equity had no jurisdiction, and that in any case the remedy provided was adequate.

The ground given by the court for denying its jurisdiction was that where a statute creates a new right, and gives a specific remedy, such remedy is exclusive. As a general rule of statutory construction, this cannot, it is submitted, be sustained on principle. It necessarily involves the conclusion that what the legislature intended was not to confer a right, and a corresponding remedy, but merely an alternative right at the option of the wrongdoer, — that is, a right to admission or to the

[8] Missouri, Kansas & Texas Ry. Co. *v.* May, 194 U. S. 267. See McClure *v.* Nye, 22 Cal. App. 248, 251, 133 Pac. 1145, 1147; Attorney-General *ex rel.* Barbour *v.* Lindsay, 178 Mich. 524, 540, 145 N. W. 98, 104.

[9] Martin *v.* Mott, 12 Wheat. (U. S.) 19.

penalty. This involves the same confusion of ideas that led to the theory that the promisee in a contract has only an alternative right to performance or damages.[1] Just as the promisee's right is not measured by the relatively ineffectual common-law remedy of damages, so a statutory right must be considered as distinct from the remedy provided.[2] Nor is the matter less clear on authority, for the courts have repeatedly held that equitable relief is available to protect a newly created right, despite the existence of a statutory remedy at law.[3] Unless the statutory remedy is clearly expressed to be exclusive, it seems that equity should apply its usual test of the adequacy of the legal remedy in the particular case.[4]

The more general question is, therefore, presented, whether, in view of the nature of the right here involved, equity could take jurisdiction to enforce it. It seems tolerably clear that the statute was designed, not to confer on each member of the public a property right to admission, but to protect individuals from the personal indignity of being discriminated against. True, this particular individual may be using his personal right in the furtherance of his business interests, but the nature of the right is not thereby altered. Hence the court might have rested on the narrow ground that equity will not protect mere rights of personality [5] as distinguished from property interests. This point was entirely overlooked, however, and the inference seems to be that an injunction would have been granted if the statutory remedy had not been adequate and exclusive. Such a result would have been most commendable. Modern courts, troubled by the historical narrowness of equity jurisdiction, have sought to do justice by liberally broadening the conception of property rights to an extent that would have surprised the early chancellors.[6] In England the situation has been remedied

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[1] See WILLISTON'S WALD'S POLLOCK ON CONTRACTS, 202, n. (*g*). A short answer to this theory is, of course, that were it true, specific enforcement of a contract at equity would be impossible.

[2] See 1 LEWIS' SUTHERLAND ON STATUTORY CONSTRUCTION, 2 ed., 549. "A statutory right is to be distinguished from the remedy for its enforcement."

[3] Cory *v.* Yarmouth, etc. Ry. Co., 3 Hare 593; Cooper *v.* Whittingham, 15 Ch.D. 501; Beckford *v.* Hood, 7 Durn. & East 620; Letton *v.* Goodden, L. R. 2 Eq. 123; Stevens *v.* Clark, [1901] 1 Ch. 894; Norwood *v.* Dickey, 18 Ga. 528; Hamilton & Milton Road Co. *v.* Raspberry, 13 Ont. 466. And see Dudley *v.* Mayhew, 3 N. Y. 9, 15; Board of Commissioners *v.* Dickinson, 153 Ind. 682, 688, 53 N. E. 929, 931; Fajder *v.* Village of Aitkin, 87 Minn. 445, 447, 92 N. W. 332.

[4] Price *v.* Kramer, 4 Colo. 546; Board of Commissioners *v.* Dickinson, *supra;* Fajder *v.* Village of Aitkin, *supra.* In these cases relief was refused merely on the ground that the statutory remedy was adequate. And see Hickman *v.* City of Kansas, 120 Mo. 110, 118, 25 S. W. 225, 226.

[5] BISPHAM, EQUITY, 5 ed., 584, n. 2. "It is the rights of property, or rather, rights in property, that equity interferes to protect. A party is not entitled to a writ of injunction for a matter affecting his person." And see KERR, INJUNCTIONS, 1, 2.

The tendency of courts to consider this as going to the jurisdiction rather than to their discretion seems unfortunate. The whole distinction has been abolished in England by the Judicature Act of 1873, § 25, subsection 8; and it has been much criticised in this country. See ABBOTT, JUSTICE AND THE MODERN LAW, 32. Nevertheless, it must be considered as definitely settled in the American law to-day.

[6] Edison *v.* Edison Polyform Mfg. Co., 73 N. J. Eq. 136, 67 Atl. 392 (use of name enjoined); Itzkovitch *v.* Whitaker, 115 La. 479, 39 So. 499 (publication of picture enjoined); Woolsey *v.* Judd, 4 Duer 379 (publication of private letters enjoined). For isolated *dicta* which seem to cut loose from the old rule entirely, see Schuyler *v.*

by statute, and it is high time that the preventive jurisdiction of equity be extended in this country.

If the jurisdictional difficulty be surmounted in the principal case, an injunction was clearly warranted. In the first place, the legal remedy was substantially inadequate. However reasonable the amount of the penalty might be in general as compensation, in the plaintiff's particular case, his business being impaired, no amount of money save an income approximating his loss in earning power would do practical justice. It is conceivable that a hostile theatrical corporation might, by a course of systematic exclusion, entirely ruin him professionally; and certainly the recovery of the statutory penalty would be a trifling recompense. Furthermore, a most important circumstance to be considered by a court in determining its discretion in such a case is the manner in which the public interest in free criticism is involved. That the public concern is always a strong element to be weighed by equity in coming to a decision [7] is demonstrated by the positive manner in which decrees have been given [8] and refused [9] largely upon that ground. And surely there is scarcely a more pointed application of the principle than that here presented. For the wrongful coercion of free speech and opinion, even in such a relatively unimportant matter as theatrical reviews, strikes directly at the public's legitimate interest in unobstructed and unbiased dissemination of information.

If on the other hand the plaintiff was in fact wrongfully using his position to make malicious and unfair comment on the defendant, to the detriment of the latter's business, though he might not be liable for defamation at law, nevertheless his position might be so far from equitable that the court would be justified in washing its hands of the affair and remitting him to his remedy at law.

IS THE INCIDENCE OF THE BURDEN OF PROOF A MATTER OF SUBSTANTIVE OR PROCEDURAL LAW? — The Supreme Court of the United States has recently decided that the federal rule establishing contributory negligence as an affirmative defence must apply in suits arising under the Federal Employers' Liability Act, even though the *lex fori* requires the plaintiff to show his own freedom from fault. By virtue of the Conformity Act, federal courts would follow the local practice in matters of procedure,[1] though the action is brought under a federal statute. "But it is a misnomer," maintains the court, "to say that the question as to the burden of proof is a mere matter of state procedure. For, in Vermont, and in a few other states, proof of plaintiff's freedom from fault is a part of the very substance of his case." *Central Vermont Ry. Co.* v. *White*, 238 U. S. 507. The same question has arisen in another

Curtis, 147 N. Y. 434, 42 N. E. 22, 24; *Ex parte* Warfield, 40 Tex. Crim. R. 413, 421. 50 S. W. 933, 935; Norwood *v.* Dickey, 18 Ga. 528.

[7] See Union Pac. Ry. Co. *v.* Chicago, etc. Ry. Co., 163 U. S. 564, 603. "Considerations of the interest of the public must be given due weight by a court of equity."

[8] Parrott *v.* Atlantic & N. C. R. Co., 165 N. C. 295, 53 S. E. 432.

[9] Conger *v.* New York, W. S. & B. R. Co., 120 N. Y. 29, 23 N. E. 983.

[1] 1 U. S. COMP. STAT. 1913, § 1537, p. 657.